IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1878

THE SEBRING UTILITES COMMISSION, THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, and the CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE and TALLAHASSEE, FLORIDA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

PEYTON G. BOWMAN, III
C. FLOYD MATHEWS
REID & PRIEST
1701 K Street, N.W.
Washington, D.C. 20006

Attorneys for
Florida Power & Light Company

July 18, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1878

THE SEBRING UTILITIES COMMISSION, THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, and the CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE and TALLAHASSEE, FLORIDA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

Florida Power & Light Company (FP&L), an intervenor in support of respondent Federal Energy Regulatory Commission below, submits this brief in opposition to the Petition for Writ of Certiorari to review the judgment entered in this case on March 20, 1979.

OPINIONS BELOW

An adequate reference to the opinions delivered in the Court of Appeals below and in the Federal Energy Regulatory Commission (or its predecessor agency the Federal Power Commission) [1] is made in the Petition. The opinion of the Court below has now been reported. *Sebring Utilities Commission et al.* v. *FERC,* 591 F.2d 1003 (5th Cir. 1979).

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

It is respectfully submitted that the following question, rather than the questions urged by the Petitioners, is the only one correctly presented here in light of the opinion of the Court of Appeals (Petition Appendix A, pp. A-28 to A-35):

Whether the Court of Appeals correctly held that the Commission has no jurisdiction to curtail natural gas transported by an interstate pipeline company but not owned by the interstate pipeline company?

STATUTE INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

Florida Power & Light Company (FP&L) is an electric generating, transmission and distribution company,

[1] These agencies are sometimes hereinafter referred to as the "Commission", or "FERC" or "FPC", where appropriate.

operating entirely within the State of Florida, which makes a nonjurisdictional purchase of approximately 200,000 Mcf per day of natural gas to produce electric energy from Amoco Production Company (Amoco) in Louisiana under a general corporate warranty contract. FP&L consumes all its gas in its electric generation facilities in Florida. Therefore, the sale by Amoco is not subject to the Commission's jurisdiction under the Natural Gas Act because it is not a sale for resale. Amoco delivers FP&L's gas to Florida Gas Transmission Company's (Florida Gas) interstate pipeline in Louisiana for transportation to FP&L in Florida under Florida Gas' T-3 Transportation Rate Schedule. This transportation service rendered by Florida Gas is jurisdictional under the Natural Gas Act and was certificated by the FPC. *Florida Gas Transmission Company,* 37 F.P.C. 424, modified at 993 (1967). The Commission's certificate order specifically ruled that the sale from Amoco to FP&L was nonjurisdictional. 37 F.P.C. 427-443. The T-3 service will expire pursuant to its terms in June of 1988.

Two earlier similar arrangements were implemented for the nonjurisdictional purchase of natural gas in Texas from Sun Oil Company by FP&L and by Florida Power Corporation (Power Corporation), and this natural gas was transported to Florida by Florida Gas under the jurisdictional T-1 and T-2 transportation services. *Houston Texas Gas & Oil Corporation, et al.,* 16 F.P.C. 118 (1956), affirmed *sub nom Florida Economic Advisory Council* v. *FPC.,* 251 F.2d 643 (1957), *cert. denied,* 356 U.S. 959 (1958).[2]

[2] Houston Texas Gas & Oil Corporation and Coastal Transmission Corporation were the corporate predecessors of Florida Gas.

In this proceeding, the Commission granted the original certificate to build the Florida Gas system. Without the transportation services the pipeline would not have been economically feasible. 16 F.P.C. at 132-136. The later certification of the T-3 service greatly strengthened the economic position of Florida Gas and, because of economies of scale caused by larger diameter pipe, resulted in an immediate rate reduction for all of Florida Gas' customers including Petitioners. 37 F.P.C. at 426, 443. It is fair to say that there would be no Florida Gas pipeline and no gas to be curtailed if FP&L and Power Corporation had not obligated themselves to pay many millions of dollars for transportation services over a period of 20 years. The T-1 and T-2 services expired pursuant to their terms in June, 1979; therefore, only the T-3 gas will be affected by the instant proceeding.

The Petitioners (hereinafter called "Florida Cities" or "Petitioners") consist of a group of municipal utilities which purchase gas either directly or indirectly from Florida Gas under interruptible contracts for use primarily in generating electric energy. (Petition p. 5, R 171)[3]

FP&L regards Florida Cities' Statement of the Case as substantially accurate insofar as it is limited to a simple recitation of the procedural history of the *Lehigh Portland Cement Company* v. *Florida Gas Transmission Company* proceeding and the *Ft. Pierce Utility Authority of the City of Ft. Pierce et al.* v. *Florida Gas Transmission Company et al.* proceeding. However, the Statement of the Case contains much argu-

[3] The prefix R refers to the record page as certified by the Commission to the Fifth Circuit.

ment which will be addressed in the section of this brief headed "Argument".

ARGUMENT

I. This Proceeding Does Not Involve An Issue Of Vital National Concern; Therefore *Certiorari* Should Be Denied

While the T-3 transportation is of great importance to FP&L and its ratepayers, it is a fairly unique situation and cannot be said to have far-reaching national importance. The T-3 service is by far the largest such service provided by an interstate pipeline and there are only a handful of others.[4]

Thus, the Petition is clearly inaccurate when it states that the Fifth Circuit's decision will result in the release of "potentially vast amounts of natural gas" from regulation. (pp. 18-19) The decision in this case that FP&L's transportation gas is not subject to curtailment has had little nationwide significance and little effect upon Commission regulations issued under the Natural Gas Act and other statutes. As previously indicated, transportation of user-owned gas by interstate pipelines is relatively rare; most pipeline deliveries are sales of the pipeline's own general supply.

The Natural Gas Policy Act (P.L. 95-621) was enacted November 9, 1978 as part of comprehensive national energy legislation. In considering this legislation Congress thoroughly scrutinized the curtailment policies then being implemented by the Commission and

[4] It is recognized that the Commission recently has issued a few one year transportation certificates to replace imported oil. These, however, are, by their terms, temporary expedients during the period of an excess gas "bubble" and are not intended to be a permanent fixture of FERC regulation.

was fully aware of the Commission's stated policy that transportation gas was not subject to curtailment. The fact that Congress did not in the National Energy Act direct the Commission to commence curtailment of transportation gas indicates that Congress did not consider such curtailment would significantly affect the national natural gas shortage. Indeed, the Congress went so far as to explicity provide for the continuation of existing transportation certificates:

> SEC. 404. LIMITATION ON REVOKING OR AMENDING CERTAIN PRE-1969 CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.
>
> (a) GENERAL RULE.—The Commission may not, during the 10-year period beginning on the date of the enactment of this Act, revoke or amend any certificate of public convenience and necessity issued before January 1, 1969, under section 7 of the Natural Gas Act for the transportation of natural gas owned by any electric utility except upon the application of the person to whom such certificate was issued.

This proceeding is not even of vital concern to Florida Cities. It is clear that curtailment of FP&L's gas would not significantly benefit them. Florida Cities carefully state (Petition, p. 18) that the transportation gas constituted over 60 percent of Florida Gas' volumes at the time of the close of the record, but that percentage has been reduced significantly since June, 1979 when the T-1 and T-2 services terminated. The T-3 service is the only transportation service on Florida Gas' system today; it amounts to 200,000 Mcf per day or less than 30 percent of Florida Gas' current peak deliveries. Even if this gas could be curtailed and title somehow transferred to Florida Gas, it would not all go

to Florida Cities, but would be reallocated among all of Florida Gas' customers, including FP&L, under Florida Gas' curtailment plan.[5] Further, the T-3 service will terminate pursuant to its own terms in 1988 (with a possible substantial reduction in 1983). Therefore, any benefit to Florida Gas' other customers would be limited to this remaining period of time.

II. Decisions In Two Other Circuits Squarely Support The Fifth Circuit's Holding In This Case

Petitioners attempt to rely on three "recent" Supreme Court decisions in an attempt to establish that the Fifth Circuit has misapplied these decisions of the Supreme Court.[6] These three cases are easily distinguishable but there are two decisions in other circuits which squarely support the Fifth Circuit's decision.

The District of Columbia Circuit, in the very "recent" *American Public Gas Association* v. *FERC*, 587 F.2d 1089 (1978) (APGA), considered a Commission rule which would exempt certain user-owned transportation gas from the operation of the transporting pipeline's curtailment plan. The Court rejected arguments that such transportation gas must be subject to the pipeline's curtailment plan, giving heavy emphasis

---

[5] The constitutional problems associated with confiscating FP&L's gas and transferring it to a likely unwilling Florida Gas are staggering. Furthermore, as interruptible boiler fuel users, Cities would be at the bottom of any curtailment allocation.

[6] *F.P.C.* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972); *California* v. *Southland Royalty Company*, 436 U.S. 519 (1978); *California* v. *LoVaca Gathering Company*, 379 U.S. 366 (1965). The *LoVaca* case is not exactly "recent", being 14 years old.

to the fact that the transported gas was not owned by the pipeline:

> . . . the purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries of its *own gas*. [Emphasis in original] 587 F.2d 1098.

The court in *APGA*, specifically distinguishing *LoVaca* (one of the cases relied on by Petitioners), was also aware of the fact that, as here, the transported gas was in a commingled stream with the pipeline's own gas supply, but the court did not consider that this would confer curtailment jurisdiction over gas transported for the owner:

> The fact that, under the Commission's plan, consumer owned gas will be transported in a commingled stream with the pipeline's own gas supply does not create Commission jurisdiction over direct sales. *California* v. *LoVaca Gathering Company*, 379 U.S. 366, 85 S. Ct. 486, 13 L.Ed. 2d 357 (1965), upon which petitioners rely, turned on the potential abuse inherent in the pipeline's ownership of gas purchased in both jurisdictional and nonjurisdictional sales—*a condition not present here*. [Emphasis supplied] 587 F.2d 1097, n. 9.

This language is equally applicable to the gas transported by Florida Gas where there also is no "potential abuse" because the pipeline does not purchase both jurisdictional and nonjurisdictional gas.

The *APGA* case followed a Third Circuit opinion, *Public Service Electric and Gas Company* v. *Federal Power Commission*, 371 F.2d 1 (1967), *cert. denied*, 389 U.S. 849 (1967), issued in January 1967, shortly after *LoVaca*. The Third Circuit specifically limited

LoVaca to situations where commingling of a pipeline's own gas could give rise to abuse.

In the *Public Service* case, Texaco, Inc. delivered its own gas to Transcontinental Gas Pipe Line Corporation (Transco) in Texas and Louisiana. The gas was transported to New Jersey where it was redelivered to Texaco for use in its refinery as an industrial fuel. By contract, the gas remained the property of Texaco although it was commingled with gas traveling in an interstate stream throughout Transco's pipeline from the Gulf Coast to New Jersey. It was clearly recognized by all concerned that the specific molecules of gas delivered to Transco by Texaco would not necessarily be redelivered to Texaco in New Jersey.

Public Service, a local distributor in New Jersey and customer of Transco, opposed the transaction because it wished to make the sale itself. Relying on *LoVaca*, Public Service argued that the Commission had jurisdiction over Texaco's gas once it became intermingled with Transco's. The Third Circuit disagreed:

> The claim to Commission jurisdiction in Lo-Vaca . . . was sustained on facts which are not present in the case now before us. *Texaco is the producer and owner of gas which it proposed to use as an industrial fuel in its refinery at West Deptford. It contracted with Transcon for conventional transportation service for which the latter was to receive a fixed charge per MCF of gas transported. The arrangement would not involve either a sale by Texaco to Transcon or a resale by Transcon to Texaco. The expected commingling of gas owned by Texaco with gas purchased by Transcon for resale would not alter the substance of the transaction.* We are of the opinion that under these circumstances the doctrine of commingling, as applied in Lo-Vaca . . . has no application in the instant case because of the absence of a jurisdictional

> sale for either consumption or resale. Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; in fact, the transaction was cast in a form which made it subject to the jurisdiction which the Commission properly assumed. *Public Service Electric and Gas Company* v. *Federal Power Commission,* 371 F.2d 1, *cert. denied,* 389 U.S. 849, January, 1967. (Emphasis supplied)

The fact situation in the instant case is, in every material respect, identical to *Public Service.* Admittedly, FP&L does not consume gas which it owned during the production stage, as was the case with Texaco. However, the determinative factor is the ownership when the gas enters the jurisdictional facilities of the pipeline. In both cases the gas is owned by the ultimate consumer when it is delivered to the pipeline. The same factual situation that exists in the instant case underlies the *APGA* case where the gas involved clearly was purchased from others before it entered jurisdictional facilities. Thus, there is full agreement among the Third Circuit, the District of Columbia Circuit and the Fifth Circuit that commingling of user-owned transportation gas with pipeline gas does not establish Commission jurisdiction over rates or curtailment.

In the face of such direct support for the Fifth Circuit's holding, Petitioners have had to rely on three cases, which factually and legally are easily distinguishable from the instant proceeding: *F.P.C.* v. *Louisiana Power & Light Company,* 406 U.S. 621 (1972); *California* v. *Southland Royalty Company,* 436 U.S. 519 (1978); *California* v. *LoVaca Gathering Company,* 379 U.S. 366 (1965). None of these decisions held that the Commission has authority to confiscate gas owned

by the user and transported by an interstate pipeline, or to reallocate that gas under the interstate pipeline's curtailment plan. The Fifth Circuit therefore was correct not to extend the Supreme Court's decisions in order to authorize the curtailment of transportation gas.

F.P.C. v. *Louisiana Power & Light Company, supra,* is the landmark case on curtailment of a pipeline's own gas, but it has no relevance whatsoever to curtailment of gas transported by a pipeline but owned by others. Florida Cities contend (Petition, p. 14) that the following language in the *Louisiana* case authorizes the curtailment of transportation gas:

> Curtailment regulations are not *rate-setting* regulations but regulations of the "transportation" of natural gas and thus within FPC jurisdiction under the opening sentence of Section 1(b) that [t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce . . .

But Florida Cities are quoting this language out of context. The interstate pipeline's direct sale customers in the *Louisiana* case had argued that, because the Commission had no *rate* jurisdiction under the Natural Gas Act over their purchases, that they should also not be subject to the Commission's *curtailment* jurisdiction. The direct sale customers contended that the Commission was basing its curtailment jurisdiction under Sections 4 and 5 of the Natural Gas Act, that these rate provisions could not be applied to direct sales, and therefore the Commission had no curtailment jurisdiction over direct sales. In rejecting this argument of the direct sales customers, the Supreme Court ruled that direct sales were subject to the Commission's trans-

portation jurisdiction, but there was no issue whatsoever of curtailment of transportation gas not owned by the pipeline but transported for others.

Petitioners also rely on the *Southland* case (Petition, p. 15) to argue that ownership of natural gas cannot affect the Commission's jurisdiction to curtail transported gas. *Southland* only held that once gas becomes subject to Commission jurisdiction it cannot lose its jurisdictional status unless an abandonment of the service has been granted under Section 7(b) of the Natural Gas Act. In the instant proceeding, the gas involved never has been jurisdictional. Hence, *Southland* is totally inapplicable.

Southland was not even a curtailment case. In *Southland* the Supreme Court considered whether it was necessary to obtain abandonment authorization under Section 7(b) of the Natural Gas Act in order to terminate deliveries of natural gas from producing acreage which had been dedicated by lessees to the interstate market pursuant to certificates of unlimited duration. The owners of the mineral fee interest of the producing acreage attempted to sell the production to an intrastate purchaser after the expiration under local law of a 50-year lease. The Supreme Court ruled in *Southland* that the contractual terms governing expiration of the lease agreement under local law could not defeat the Commission's jurisdiction once the gas had been dedicated to interstate commerce pursuant to a certificate of unlimited duration. *Southland* was concerned with the concept of abandonment under Section 7(b) of the Natural Gas Act and the concept of dedication of gas to the interstate market.

In the *Sebring* proceeding we are concerned with the issue of the Commission's jurisdiction to curtail

user-owned gas, not with the Commission's abandonment authority. *Southland* did not hold that the Commission has authority to confiscate user-owned gas in order to permit its reallocation by the transporting pipeline. Additionally, FP&L has not dedicated its own gas to Florida Gas' system supply. Therefore the Fifth Circuit correctly held that the *Southland* decision is inapplicable.[7]

Petitioners' reliance upon the *LoVaca* case is also misplaced. (Petition, pp. 16-18). Petitioners argue that "commingling" of FP&L's gas with Florida Gas' supplies establishes the Commission's curtailment jurisdiction. The issue in *LoVaca* was the Commission's jurisdiction over sales of natural gas to an interstate pipeline for its own use. Restrictive clauses in the contracts for the sale of the gas stated that the gas must be used by the pipeline in the State where the gas was produced, and that sales of such gas would not be subject to the jurisdiction of the Commission because it was not sold for resale. The Supreme Court rejected this restricted use argument, and held that once the gas was "commingled" in the interstate pipeline with gas from other sources that at least a portion of the gas would in fact be resold outside its State of origin, thus establishing the Commission's rate jurisdiction over the sales to the interstate pipeline. The facts of the *LoVaca* case are quite different from this proceeding. FP&L never has contended that its gas was not being transported in interstate commerce, but the *LoVaca* decision was concerned with the Commission's

---

[7] *Southland* supports FP&L's position in holding that the terms of a certificate must be strictly observed. The terms of the T-3 certificate specify that *all* gas delivered to Florida Gas for FP&L's account must be redelivered to FP&L.

rate jurisdiction, not its curtailment jurisdiction. The Supreme Court was especially concerned that failure to hold the *LoVaca* sales jurisdictional would permit pipelines to discriminate in favor of nonjurisdictional suppliers. 369 U.S. at 369-370. There is no such problem here since none of FP&L's gas is sold to Florida Gas. As previously discussed in this brief, *LoVaca* was specifically distinguished by the courts in *Public Service* and *APGA*. The Fifth Circuit, therefore, correctly decided that the *LoVaca* case is inapplicable.

III. Florida Cities Have Not Been Treated Unfairly

Florida Cities argue (Petition pp. 19-20) that to be "fair" *certiorari* should be granted because their use of natural gas is similar to FP&L's use of natural gas, and because Florida Cities have made allegations of monopoly practices, and "illegal transactions."[8] All of these arguments are without any foundation and hardly present grounds for a grant of *certiorari*.

First, there are significant practical and economic differences between Florida Cities' purchase of natural gas and FP&L's purchase of gas. FP&L bound itself to long-term firm contracts and therefore undertook the risk that the delivered cost of natural gas might increase compared to the cost of oil. Florida Cities undertook none of these risks, chose to buy cheaper interruptible gas, and was free to switch to oil if oil costs declined.

Second, as the Fifth Circuit correctly ruled, a mere allegation of anticompetitive effects does not confer

[8] Florida Cities apparently are not concerned about the unfairness of confiscating gas which has been under contract to FP&L for over ten years.

jurisdiction upon the Commission where it does not otherwise exist. (Petition, Appendix A-35, n. 58) Florida Cities' allegation of monopolistic behavior is an attempt to bootstrap jurisdiction; if jurisdiction to curtail transportation gas does not exist in the first place no allegation of anticompetitive effects can confer it.

Third, Florida Cities' general allegation of "illegal transactions" on the part of others are matters that are being considered in another proceeding at the Commission. (Docket No. IN78-2) There never has been the slightest official inference of wrongdoing on the part of FP&L. Again, since the Commission lacks jurisdiction to curtail the transportation gas, any allegation of wrongdoing, even if proved, would not confer jurisdiction upon the Commission.

CONCLUSION

For the foregoing reasons, the Petition for *certiorari* should be denied.

Respectfully submitted,

Peyton G. Bowman, III
C. Floyd Mathews
Reid & Priest
1701 K Street, N.W.
Washington, D.C. 20006

Attorneys for
Florida Power & Light Company

July 18, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Brief in Opposition in accordance with Rule 33 of the Supreme Court of the United States.

PEYTON G. BOWMAN, III
Attorney for
Florida Power & Light Company

July 18, 1979